Supreme Court, U.S.
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No. 92-131

In the Supreme Court of the United States

OCTOBER TERM, 1992

DOUGLAS EDWARD BATTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order suppressing evidence seized from his bag at an airport.

1. Petitioner was indicted by a grand jury sitting in the United States District Court for the District of Hawaii. He was charged with possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a).

Petitioner moved to suppress evidence seized by government agents from petitioner's carry-on bag at the Honolulu International Airport. The evidence at the suppression hearing showed that a Drug Enforcement Administration agent approached petitioner after he disembarked from an airplane. The

agent identified herself and asked if she could ask petitioner some questions. Petitioner told the agent that he was rushing to catch a connecting flight, but the flight he referred to was not scheduled to leave for an hour and a half, and he was unable to produce his airline ticket. Petitioner became nervous and his hands began to shake. When the agent asked permission to search his bag, petitioner grabbed the bag, clutched it to his body, and stepped backward. The agent then carried the bag to an office for a dog sniff, and the dog alerted to the smell of narcotics. Pet. App. 7a-9a.

On May 29, 1991, the district court suppressed the evidence seized. Pet. App. 1a-5a. The court held that petitioner was seized during the questioning process and that his detention and the seizure of his bag were not supported by reasonable suspicion. *Id.* at 4a-5a.

The court of appeals reversed. Pet. App. 6a-10a. The court ruled that petitioner was not seized during the questioning process, and that there was reasonable suspicion that justified the agent in taking the bag to the office for the dog sniff. The court found reasonable suspicion from petitioner's implausible explanation about hurrying to catch a flight that was not scheduled to leave for an hour and a half, his failure to produce his airline ticket, his nervousness, and the manner in which he clutched the bag. *Id.* at 9a-10a.

2. Petitioner contends (Pet. 4-11) that an agent may not attach significance to the manner in which a suspect refuses consent to a search, and that the court of appeals failed to give due deference to the factual findings of the district court. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the

same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1992

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.